UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

THELMA KOCZAN, Appellant, v. DEPARTMENT OF THE ARMY, Agency.	DOCKET NUMBER BN07528910021 DATE: OCT 23 1989

William J. Lafferty, Esq., Boston, Massachusetts, for the appellant.

Paul D. Crane, Fort Devens, Massachusetts, for the agency.

BEFORE

Daniel R. Levinson, Chairman
Maria L. Johnson, Vice Chairman
Samuel W. Bogley, Member

OPINION AND ORDER

The appellant petitions for review of an initial decision, issued on January 18, 1989, that dismissed her petition for appeal for lack of jurisdiction because the appellant had waived her appeal rights in a "last-chance" settlement agreement. For the reasons discussed in this Opinion and Order, the petition is DENIED because it does not meet the criteria for review set forth at 5 C.F.R. § 1201.115. The Board REOPENS this case on its own motion

under 5 C.F.R. § 1201.117, however, and AFFIRMS the initial decision as MODIFIED by this Opinion and Order.

BACKGROUND

On October 4, 1988, the agency issued a Notice of Decision to remove the appellant, effective October 7, from her position as a GS-5 Purchasing Agent in the agency's Directorate of Contracting, for failure to meet a critical element of her performance standards. Appeal File (AF), Tab 5, Subtab 4e. In a memorandum also dated October 4, the agency offered the appellant a position as a GS-4 Voucher Examiner in its Directorate of Resource Management, but only if the appellant and her union representative agreed to the terms of an accompanying Agreement. AF, Tab 6. The agency amended its Notice of Decision on October 7 to extend the effective date of the removal to October 11. AF, Tab 5, Subtab 4c.

The agency, the appellant, and the appellant's union representative executed the Agreement on October 11. AF, Tab 5, Subtab 4b. It recites that the agency had given the appellant notice of its decision to remove her from her GS-5 position because of poor performance, but that it desired to give her another chance to be a productive employee. The agency agreed to place the appellant in the position of Voucher Examiner, GS-4 (step 10), and to suspend the removal action. The appellant agreed that if her performance was

less than "fully successful" during her first year in the GS-4 position, the removal action would be reinstated and effected. The appellant further agreed to waive her right to appeal the then-suspended removal action as well as any performance-based action during her first year in the new position.

The appellant filed a petition for appeal in the regional office on October 24, pleading in the alternative that she had been removed or demoted from her GS-5 position. The agency submitted the Agreement executed on October 11, and moved to dismiss the appeal for lack of jurisdiction. AF, Tab 5. The appellant did not deny the execution of the October 11 Agreement. She argued, however, that: (1) The terms of the Agreement should not be enforced because they are unfair and unconscionable; (2) any purported waiver was coerced; (3) the waiver of appeal rights lacked consideration because she had already been installed in the GS-4 position before October 11; and (4) the Agreement was a nullity because it was not signed by October 7, the deadline specified in the October 4 memorandum. AF, Tab 6.

The administrative judge dismissed the petition for lack of jurisdiction, finding that the October 11 Agreement was freely entered into, fair, and constituted a knowing and intelligent waiver of the appellant's appeal rights. He rejected the appellant's arguments as failing to allege non-frivolous factual issues justifying a hearing. The appellant has submitted no new evidence in her petition for

review. She raises the same issues argued below, and additionally argues that the administrative judge improperly denied her a hearing on the jurisdictional issues.[1]

ANALYSIS

The October 11 waiver of appeal rights is valid on its face.

In *Ferby v. United States Postal Service*, 26 M.S.P.R. 451, 456 (1985), we held that a waiver of appeal rights in a "last-chance" settlement agreement is valid if its terms are comprehensive, fair, freely made, and are not the result of duress or bad faith negotiation on the agency's part. The Federal Circuit upheld a similar agreement in *McCall v. United States Postal Service*, 839 F.2d 664 (Fed. Cir. 1988).

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[1] She also raises two objections to the initial decision which are not discussed below because they are irrelevant to the pertinent jurisdictional issues. First, the appellant challenges the administrative judge's characterization of her various assertions as "conflicting." The administrative judge did not dismiss the appeal because the appellant pleaded in the alternative. He dismissed the appeal because the appellant offered no credible evidence to support jurisdiction under any theory.

The appellant also challenges the agency's statement in its October 4 Notice of Decision that no other position was available within the Directorate of Contracting (the appellant's work unit). *See* AF, Tab 5, Subtab 4e. She argues that this statement was misleading because the average person would understand that no jobs were available in any work unit. The appellant does not explain how she could have had such an understanding in light of the agency's simultaneous offer of a position in the Directorate of Resource Management. Even if another position was available in the appellant's work unit, the agency could have offered it to the appellant with the same waiver of appeal rights as is contained in the October 11 Agreement, or could have offered no position at all.

The October 11 Agreement is similar to the *Ferby* and *McCall* agreements in that the appellant agreed to extensive performance conditions during a one-year probationary period, and waived all rights of appeal from performance-based actions taken during the probationary period.[2]

Although similar, the October 11 Agreement is distinguishable in two respects from the agreements approved in *McCall* and *Ferby*. First, unlike those employees, the appellant had not yet been removed or demoted from her GS-5 position when the Agreement was executed. In *Ferby*, the Board specifically reserved the question of whether a last-chance agreement would violate public policy if it was predicated on something less than a fully effected removal. 26 M.S.P.R. at 456 n.3. We have subsequently upheld a waiver of appeal rights in a last-chance agreement executed after an agency's decision to remove, but before the removal became effective. *Gonzales v. Department of the Air Force*, 38 M.S.P.R. 162, 165 (1988); *see also O'Neal v. United States Postal Service*, MSPB Docket No. SL07528810209 (Feb. 17, 1989).

Second, the October 11 Agreement is distinguishable from the *McCall* and *Ferby* agreements in that the appellant

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[2] The appellant asserts that she has constitutional as well as statutory rights to appeal her removal or demotion, and that it is "outright unconscionable" to require her to waive those rights. The appellant is of course correct that she cannot be required to waive her appeal rights, but nothing precludes an employee from waiving constitutional as well as statutory rights. *See McCall*, 839 F.2d at 667; *Ferby*, 26 M.S.P.R. at 455-56.

agreed to take a different, lower-graded position rather than retention in her former position. She argues that it is inherently unfair to waive the opportunity to improve and the right to appeal a performance-based removal from a job that one has never before performed.

We find that a last-chance settlement agreement involving a demotion is not unconscionable *per se*. The essence of the appellant's bargain was the same as that of an employee who retains his former position. She retained her employment and was given an opportunity to demonstrate satisfactory performance. In return, she gave up the right to appeal her original removal, a course in which she had a substantial risk of forfeiting any right to employment. *See McCall*, 839 F.2d at 667. Even if a demotion might be viewed as harsh, or even unreasonable, that is not sufficient to invalidate the agreement as unconscionable. *See Gonzales*, 38 M.S.P.R. at 167, *citing Tootsie Roll Indus. v. Local Union No. 1, Bakery, Confectionery & Tobacco Workers' Int'l Union*, 832 F.2d 81, 83 (7th Cir. 1987).

There is no evidence that the downgrade accepted by the appellant in the October 11 Agreement is inherently unfair. The agency was removing the appellant from her GS-5 position because, in its view, she was not satisfactorily performing her duties, even after an opportunity to improve, and would have as good or even a better chance of performing satisfactorily in the GS-4 position. There is no evidence that the agency offered the new position in the bad-faith

knowledge or belief that the appellant was unqualified for or would be unable to perform the duties of that position. Moreover, if the agency were to remove the appellant from her new position under the terms of the Agreement, the appellant may appeal the action for the Board's preliminary jurisdictional determination of whether the agency invoked the Agreement in good faith. *See McCall*, 839 F.2d at 667.

There is no evidence of coercion.

An employee's decision to execute a settlement agreement is presumed to be voluntary. *Gonzales v. Department of the Air Force*, 38 M.S.P.R. 162, 166 (1988), *citing Christie v. United States*, 518 F.2d 584, 587-88 (Ct. Cl. 1975). The mere fact that the appellant was faced with an unpleasant choice does not negate the presumption. *Id.* An appellant must show that one side involuntarily accepted the terms of the other, that circumstances permitted no other alternative, and that the circumstances were the result of coercive acts of the opposite party. *See Christie*, 518 F.2d at 587.

The October 11 Agreement specifically advised the appellant that she could appeal her removal if she chose not to sign the Agreement. She also attested that the waiver was made knowingly and voluntarily after consultation with her union representative. The only evidence of coercion the appellant offered was her handwritten notation on the October 4 memorandum conveying the settlement agreement:

"signed under protest 10/04/88 TK." AF, Tab 6. That alone is clearly insufficient to raise an inference of coercion. *See Bravman v. Department of the Navy*, 26 M.S.P.R. 169, 171-72 (1985) (retirement voluntary despite handwritten notation "Involuntary Retirement" on SF-52); *cf. Lang v. Department of Agriculture*, 35 M.S.P.R. 314 (1987) (no mutual mistake where provisions crossed out of draft agreement but no objection made at time of execution).

There is no evidence that the agency appointed the appellant to the GS-4 position prior to October 11.

The appellant claims that, because the agency appointed her to the GS-4 position prior to October 11, no consideration supported her purported waiver of appeal rights on that date. There is no credible evidence, however, that the agency demoted the appellant from her GS-5 position prior to October 11. The agency submitted an SF-50 showing that the appellant was appointed to the GS-4 position effective November 20. AF, Tab 7.[3]

While the appellant asserts that the administrative judge erred in giving any credit to the SF-50, her sole evidence of a prior appointment was her handwritten notation that she was signing the agency's October 4 memorandum "under protest." AF, Tab 6. This writing cannot be

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[3] The agency submitted additional evidence on this issue, but the administrative judge did not consider it because it was filed after the record closed, and because it was not served on the appellant. We similarly have not considered the additional evidence in denying the petition for review.

construed as an acceptance of the October 4 offer, which required agreement to the conditions specified in the accompanying agreement, including waiver of appeal rights. Even if the ambiguous written words could be interpreted as a rejection and counteroffer to accept the GS-4 position without the conditions of the written Agreement, the appellant has not even alleged that the agency accepted any such offer. Significantly, the appellant has not claimed that she performed the duties of the new position prior to October 11, or that her pay was adjusted to the new status by that date.

The October 11 Agreement was not defunct because it was not executed by October 7.

The appellant argues that the agency's offer of a GS-4 position expired because it was not executed by October 7. The agency did state in its memorandum of October 4 that the removal action would be effected on October 7 unless the appellant and her representative executed the enclosed Agreement by that date. AF, Tab 6. The appellant appears to reason that since no agreement was executed by October 7, the offer expired and could no longer be accepted on October 11.

The appellant's argument fails for two reasons. First, unrebutted evidence shows that the offer was extended from October 7 to October 11. By memorandum of October 7, the agency advised the appellant as follows:

> At the request of your representative, I have changed the effective date of your removal to 11 October 1988 and the Director of Civilian Personnel has granted you an extension on your decision on the Agreement to 11 October 1988.

AF, Tab 5, Subtab 4c. The appellant has submitted nothing to rebut this evidence.

Second, nothing prevented the parties from entering into a new contract on October 11, even if the offer of October 4 had previously expired. The expiration or rejection of an offer does not preclude the very same offer being made and accepted at a subsequent time. *See* 17 C.J.S. *Contracts* § 50, at 706-07 (1963).

The administrative judge did not err in refusing to grant the appellant's request for a hearing on jurisdictional issues.

A hearing is appropriate only where a petitioner's allegations raise non-frivolous issues of fact relating to jurisdiction which cannot be resolved on the basis of documentary evidence already submitted. *McCall*, 839 F.2d at 669. The appellant has failed to raise any genuine issues of fact to be resolved at a hearing.

ORDER

This is the final order of the Merit Systems Protection Board in this appeal. 5 C.F.R. § 1201.113(c).

NOTICE TO APPELLANT

You have the right to request the United States Court of Appeals for the Federal Circuit to review the Board's final decision in your appeal if the court has jurisdiction. *See* 5 U.S.C. § 7703(a)(1). You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 30 calendar days after receipt of this order by your representative, if you have one, or receipt by you personally, whichever receipt occurs first. *See* 5 U.S.C. § 7703(b)(1).

FOR THE BOARD:

/s/ Robert E. Taylor
Clerk of the Board

Washington, D.C.